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NO.

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN CAMBRA, JR., Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners,*

v.

MICHAEL SU CHIA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court reversed a criminal conviction because the State court had applied its evidence rules "mechanistically" to prevent cross-examination and to exclude critical and reliable hearsay that a third party had repeatedly confessed that he had been the sole perpetrator of the murder charged against the defendant.

Under 28 U.S.C. § 2254(d), a federal court may not grant habeas corpus relief to a State prisoner on a claim adjudicated on its merits in State court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States."

The Questions Presented in this case are:

1. What rule, if any, is "clearly established" by *Chambers* for purposes of § 2254(d)?

2. Does a federal court's determination that it is "firmly convinced" the State court erred satisfy § 2254(d)'s prerequisite of an "unreasonable application" of Supreme Court precedent?

3. Did the state court engage in an "unreasonable application" of *Chambers* when the trial judge actually considered *Chambers* but excluded, as unreliable hearsay, statements of a third party admitting that he and others had plotted the murders of two undercover DEA agents but asserting further that Petitioner had not been involved in the plot?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	8
QUESTION 1	8
There is a split in the circuits, impacting the States' traditional rules of evidence, about the nature of the "rule" of *Chambers v. Mississippi*.	8
This case presents an important question on the meaning of the "clearly established" requirement in 28 U.S.C. § 2254(d)(1).	13
QUESTION 2	14
There is conflict among the circuits as to the meaning of "unreasonable application" in 28 U.S.C. § 2254 (d)(1), the standard used to review most State-court decisions.	14
QUESTION 3	17
This case presents an important question as to whether the State court "unreasonably applied" *Chambers*.	17
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
Cases	
Bell v. Cone, 122 S. Ct. 1843 (2002)	14
Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2001)	14, 16
Campbell v. Rice, 265 F.3d 878 (9th Cir. 2001)	13
Chambers v. Mississippi, 410 U.S. 284 (1973)	5-14, 18, 19
Chia v. Cambra, 281 F.3d 1032 (9th Cir. 2002)	8, 12, 15, 17, 19
Daniels v. United States, 254 F.3d 1180 (10th Cir. 2001)	13
Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994)	11
DiBenedetto v. Hall, 272 F.3d 1 (1st Cir. 2001)	11
Francis S. v. Stone, 221 F.3d 100 (2d Cir. 2000)	14, 16
Gardner v. Barnett, 199 F.3d 915 (7th Cir. 1999)	11
Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000)	13
Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1996)	16

TABLE OF AUTHORITIES (continued)

	Page
Huffington v. Nuth, 140 F.3d 572 (4th Cir. 1998)	11
Jones v. Goodwin, 982 F.2d 464 (11th Cir. 1993)	11
Kennaugh v. Miller, 289 F.3d 36 (2d Cir. 2002)	15
Kibbe v. DuBois, 269 F.3d 26 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 1371 (2002)	16
Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996)	16
Long v. Humphrey, 184 F.3d 758 (8th Cir. 1999)	16
Lorraine v. Coyle, 291 F.3d 416 (6th Cir. 2002)	14, 15
Mackey v. Dutton, 217 F.3d 399 (6th Cir. 2000)	11
Matteo v. Superintendent, SCI Albion, 171 F.3d 877 (3rd Cir. 1999)	16
Montana v. Egelhoff, 518 U.S. 37 (1996)	8, 10, 17
Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001)	13
Neal v. Puckett, 286 F.3d 230 (5th Cir. 2002)	15-16

TABLE OF AUTHORITIES (continued)

	Page
O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998)	16
Strickland v. Washington, 466 U.S. 668 (1984)	13
Teague v. Lane, 489 U.S. 288 (1989)	13-15
Tinsley v. Borg, 895 F.2d 520 (9th Cir. 1990)	6
Tucker v. Johnson, 242 F.3d 617 (5th Cir. 2001)	14-16
Turpin v. Kassulke, 26 F.3d 1392 (6th Cir. 1994)	11
United States v. Begay, 937 F.2d 515 (10th Cir. 1991)	11
United States v. DeVillio, 983 F.2d 1185 (2d Cir. 1993)	11
United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)	11
United States v. North 910 F.2d 843 (D.C. Cir. 1990)	11
United States v. Scheffer, 523 U.S. 303 (1998)	10
Unites States v. Szur, 289 F.3d 200 (2d Cir. 2002)	11

TABLE OF AUTHORITIES (continued)

	Page
Williams v. Taylor, 529 U.S. 362 (2000)	13-17, 19
Williamson v. United States, 512 U.S. 594, 599-600 (1994)	18
Statutes	
28 U.S.C. § 2254	8, 12-15, 18

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PETITION FOR WRIT OF CERTIORARI

Steven Cambra, Jr., Warden of the California State Prison at Pelican Bay, Crescent City, California [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals is reported at 281 F.3d 1032 (9th Cir. 2002). The order of the District Court denying habeas corpus relief is unreported. Both are reproduced in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on February 27, 2002. The Court of Appeals denied the State's Petition for Rehearing with

Suggestion for Rehearing En Banc on April 23, 2002. (Appendix E at 51.) The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

In 1988, the Federal Drug Enforcement Agency's Los Angeles office was investigating Frank Kow, a major recipient of heroin imported for distribution in the United States. Agents observed the following during surveillance:

On the evening of February 4, 1988, William Wang and respondent Michael Su Chia arrived at Kow's apartment in Chia's black Mitsubishi. Wang removed a semi-automatic pistol from the trunk and walked into Kow's apartment complex. Chia walked up the stairs to Kow's apartment and served as a "lookout." Wang reappeared, joined Chia, and the two men walked back to the Mitsubishi.

The next day, Kow called undercover DEA Agent Paul Seema. Agent Seema set up a drug buy between Kow and

undercover DEA agents Martinez and Montoya to occur later that day in the parking lot of a restaurant. Chia and his black Mitsubishi were seen at Kow's apartment at 10:30 and again at 11:30 that morning. At 11:33 a.m., Chia drove his black Mitsubishi to the restaurant parking lot. Wang, Kow, and Sun Te Chen were there. Chia spoke with them and undertook what appeared to be counter-surveillance for the drug buy.

Agents Seema, Martinez, and Montoya arrived and met with Kow in the parking lot of the restaurant. Agent Montoya showed Kow a brown leather bag containing $80,000. Kow told the agents that the heroin was at a house in Pasadena. The agents and Kow entered the agents' car, and Wang and Chen followed in a red Nissan.

Eventually, at Kow's direction, Agent Martinez pulled over to the curb. Saying the heroin was stored inside a house there, Kow exited the car. He took several steps, stopped, turned toward the car, and pointed an automatic weapon at the agents still inside. Wang and Chen pulled up behind the agents' car. Wang got out and pointed a gun at Agent Seema.

Agent Montoya handed over the money bag, and Agent Seema asked both Kow and Wang not to kill them. Wang and Kow looked at each other and then started shooting at the agents locked inside the car. Agents Montoya and Seema died from gunshot wounds.

Agent Martinez opened the car door and, while being repeatedly shot in the legs, fired his gun at Kow and Wang. Kow and Wang jumped into the red Nissan and sped away. A high-speed chase ensued, and more gunfire was exchanged between other DEA agents and Kow and Wang. The Nissan swerved out of control and crashed. The agents fired their guns until there was no movement in the Nissan. Kow and Chen died, but Wang survived.

Within an hour of the shooting, respondent Chia was arrested while driving his Mitsubishi. In the trunk, the police found a white plastic bag containing three ski masks, three sets of handcuffs, an empty .45-caliber ammunition magazine, and a box containing 43 rounds of .45-caliber ammunition.

Chia gave four separate statements to law enforcement officials. At first, he claimed that he had merely happened by the restaurant. But, later, Chia acknowledged that Wang had told him of a plan to "rip off" drug dealers and that he had taken Wang to Kow's apartment the night before the ambush. Chia said that he had been concerned for Wang's safety and that he and Wang had agreed that he would hide near the restaurant the following morning to act as Wang's bodyguard ands as a lookout during the robbery. He claimed, however, that he never saw Wang there and that he had left before the meeting took place. Chia also claimed that the ski masks found in his car were for playing jokes on his friends, and that the magazine clip belonged to Wang. He did not explain the handcuffs.

Chia was tried separately for two counts of first degree murder, one count of attempted murder, second degree robbery, and conspiracy to commit robbery. At trial, the prosecution relied on evidence including Chia's own statements to the police. In his defense, Chia sought the admission of hearsay evidence of four post-arrest statements made by Wang to law enforcement, in response to the officers' interrogation, as "declarations against penal interest."

Wang's first statement was made in the emergency room prior to Wang's surgery for his extensive gunshot wounds. Wang believed he was going to die when he told the officers that he, Sun, and Kow had agreed to steal $60,000 from the "drug traffickers." Wang admitted shooting one of the undercover agents and providing two guns for the ambush. And he said he did not know of anyone else involved in the shooting.

When Wang made his second statement to the police, it was clear that Wang would survive his injuries. This statement was a more detailed description of Wang's involvement in the actual shooting and the chase. Again, Wang did not mention Chia.

During a third interview, a police officer specifically inquired about Chia's involvement in the crime. Wang said that Chia told him not to go through with the robbery plan. Wang said that Chia was not involved in the plot and stood to gain no

drugs or money from the transaction. Wang asserted that Chia had been present at the restaurant parking lot to protect him.

In Wang's fourth statement to the police, Wang admitted that Kow had asked him one week prior to the ambush to help him "rip off" and murder some "drug dealers." Wang said that he had told Chia about the plan, and that Chia had warned Wang against involvement in the conspiracy. Chia nevertheless drove Wang to Kow's apartment in Chia's car the night before the ambush so Wang could deliver a gun and ammunition to Kow. On the following morning, according to Wang, Chia drove Wang back to Kow's apartment and left. Wang said that, when he spoke with Chia in the parking lot of the restaurant, he had told Chia to go home, but that Chia remained to protect him.

The trial judge found Wang's statements were inadmissible under the state-law hearsay exception for declarations against interest. The judge found the statements were unreliable, noting that it was common for members of a criminal conspiracy to try and shield one another from liability. The judge also found the statements did not clearly exculpate Chia because Wang's statements also corroborated Chia's involvement. The judge considered and distinguished *Chambers v. Mississippi*, 410 U.S. 284 (1973), on the basis that Wang's statements were unreliable and inculpatory of Chia.

Invoking his Fifth Amendment privilege, Wang refused to testify for Chia. Chia himself declined to testify.

Chia was convicted on all counts and was sentenced to prison for two indeterminate terms of twenty-five years to life plus eleven years. He appealed the exclusion of Wang's statements as an error under California evidence law, and the Court of Appeal rejected the claim.

Chia then filed a Petition for Writ of Habeas Corpus in the California Supreme Court, alleging that the exclusion of Wang's statements deprived him of crucial evidence for his defense in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The State court denied the petition without comment.

In 1997, almost a decade after his trial, Chia asserted his constitutional claim in a Petition for Writ of Habeas Corpus in the United States District Court. The magistrate-judge issued a report recommending that the petition be denied with prejudice. The magistrate concluded that Chia had pointed to nothing in the record requiring the federal court to disregard the California court's decision, and that Chia had not demonstrated that Wang's statement was reliable. The magistrate-judge also found that Wang's statements had been excluded at trial based upon the state court's finding that the testimony was not reliable, a finding that was supported by the state court record and was presumed to be correct under 28 U.S.C. § 2254(d). The magistrate-judge further found that Wang's statements themselves demonstrated that Chia knew of the plan to rob and murder the agents beforehand, so that the slight value of Wang's statements to Chia's defense did not outweigh the State's interest in excluding the unreliable hearsay evidence. The magistrate-judge concluded that the California court's rejection of Chia's claim therefore was not contrary to, or an unreasonable application of, clearly established federal law as determined by this Court. The District Court adopted the magistrate-judge's Report and Recommendation and entered judgment dismissing the petition with prejudice.

Chia appealed. In a published 2-to-1 decision, the Ninth Circuit Court of Appeals held that the California state court's determination that Wang's hearsay declarations remained inadmissible despite *Chambers v. Mississippi* was an "unreasonable application" of "clearly established" federal law under 28 U.S.C. § 2254(d). (Appendix D at 41.) The majority found that *Chambers* "clearly established" a general rule that due process requires the admission of hearsay if it is trustworthy and critical to the defense. (Appendix D at 33.) Then, applying the Circuit's own precedent of *Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990), the Court of Appeals found Wang's statements to be reliable and critical to Chia's defense so that exclusion of them was "clear error," i.e., the appellate court had a "firm conviction" that error had occurred.

(Appendix D at 35-36, 41.) The majority determined that the State court, in ruling the statements unreliable because they were made while "in the clutches of the law," had mechanically applied state law in contravention of *Chambers*. So it reversed the decision of the district court and remanded the matter for a new trial. (Appendix at 40-41.)

Judge Brunetti dissented. He concluded that Wang's statements did not bear sufficient indicia of reliability. Unlike in *Chambers*, his dissent explained, Wang's hearsay statements were not made spontaneously, but in custody when Wang had a motive to help his friend; Wang's statements were not corroborated; and the declarant Wang was unavailable for cross-examination by the adverse party. *Chia v. Cambra,* 281 F.3d 1032, 1041-45 (9th Cir. 2002); Appendix D at 42, 46-47.

The State's Petition for Rehearing with Suggestion for Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit was denied on April 23, 2002.

REASON FOR GRANTING THE WRIT

QUESTION 1

There is a split in the circuit courts of appeals, impacting the States' traditional rules of evidence, about the nature of the "rule" of *Chambers v. Mississippi*.

The holding of *Chambers v. Mississippi*, 410 U.S. 284, has been the subject of significant debate. In *Montana v. Egelhoff*, 518 U.S. 37 (1996), a plurality of this Court characterized *Chambers* as "an exercise in highly case-specific error correction" and questioned whether *any* holding could be "discerned from such a fact-intensive case." *Id.* at 52-53 (Scalia, J., plurality opinion). And the federal courts of appeals have adopted various and conflicting versions of the *Chambers* "rule." Nevertheless, two judges on the Ninth Circuit panel in this case discerned that *Chambers* "clearly established" a general rule that hearsay must be admitted if reliable and critical to the defense. *Chia v. Cambra*, 281 F.3d at 1041; Appendix D at 33. This case presents the question of whether *Chambers* "clearly established" such a broad and general rule—or any rule—for purposes of the restrictions upon habeas corpus relief contained in 28 U.S.C. § 2254(d).

The defendant in *Chambers*, tried for being the sole killer of a police officer, attempted to show that McDonald had committed the murder instead. 410 U.S. at 285-89. He called McDonald to testify as a witness in the defense case. *Id.* at 291. On the stand, McDonald denied committing the murder; and he recanted a previous sworn statement in which he had confessed to the murder. *Id.* at 291. Chambers attempted to question McDonald about his refutation and three statements he had made to friends, shortly after the murder and before the sworn statement, in which McDonald also had admitted being the shooter. *Id.* at 291-92. But the trial judge disallowed the examination under a State law "voucher rule" prohibiting the

impeachment of one's own witness. *Id.* at 291-92, 295. Indeed, under that rule, Chambers was bound by McDonald's recantantion. *Id.* at 296-297. Chambers attempted to call McDonald's three friends to testify about the other statements McDonald had made to them acknowledging his guilt. *Id.* at 292. The trial court excluded this evidence too, because the proposed testimony was hearsay and the State law exception for statements against interest was limited to statements against pecuniary interest. *Id.* at 292-93, 299.

This Court held that the trial judge's enforcement of the State's voucher rule infringed the defendant's right to defend. 410 U.S. at 298. The Court noted that the State's proof excluded the theory that there was more than one shooter. *Id.* at 297. Also, the Court determined, McDonald's testimony refuting his confession was "seriously adverse" to the defendant. *Id.*

But this Court did not decide whether that error alone warranted reversal because the claimed violation of due process rested on that error "in conjunction with" the trial court's refusal to permit the defendant to call other witnesses. *Id.* at 298. The Court decided that, although hearsay is traditionally excluded because it is unreliable, the statements in *Chambers* had been made "under circumstances that provided considerable assurance of their reliability" because: (1) McDonald made the statements spontaneously; (2) he made the statements to close friends; (3) he made the statements shortly after the murder; (4) the statements were corroborated by other evidence and by the number of confessions; (5) the statements were unquestionably against McDonald's interests; and (6) McDonald was present in court and subject to cross-examination by the State. 410 U.S. at 298-301. In addition to the "persuasive assurances of trustworthiness," the evidence was "critical" to the defendant's defense. *Id.* at 302.

The Court concluded, therefore, that the State's hearsay rule had been applied "mechanistically" under the circumstances. *Id.* "[T]he exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-

examine McDonald," denied the defendant his right to due process. *Id.*

In deciding *Chambers*, however, this Court took care to explain that it was not announcing any new rule of law:

> In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.

410 U.S. at 302-03.

As noted above, a plurality of this Court, in *Montana v. Egelhoff*, characterized *Chambers* as "an exercise in highly case-specific error correction." 518 U.S. at 52 (Scalia, J., plurality opinion). Accordingly, the *Egelhoff* plurality found the Montana Supreme Court erroneously concluded *Chambers* required admission of all relevant evidence. *Id.* Rather, the holding of *Chambers*, if there was one, was simply that evidentiary errors can combine to violate due process:

> Thus, the holding of *Chambers* -- if one can be discerned from such a fact-intensive case -- is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.

Id. at 53. This Court has also said that *Chambers* did not hold that a defendant is denied a fair opportunity to defend simply because a rule excludes favorable evidence. *United States v. Scheffer*, 523 U.S. 303, 316 (1998). Thus, there has been some

debate in this Court over the meaning of *Chambers*.

The meaning of *Chambers* has been made no clearer by the Circuit Courts of Appeal, which have reached a wide variety of conclusions as to what *Chambers* holds. The federal appellate courts have variously said: that *Chambers* holds that the exclusion of evidence in extreme circumstances violates due process, *DiBenedetto v. Hall*, 272 F.3d 1, 7 (1st Cir. 2001), *cert. denied sub nom., DiBenedetto v. Spencer*, 122 S. Ct. 1622 (2002); that *Chambers* announced a three-part test for trustworthiness requiring admission of statements that (a) are made spontaneously to close friends shortly after the event, (b) are corroborated by other evidence, and (c) are self-incriminating and unquestionably against penal interest, *United States v. DeVillio*, 983 F.2d 1185, 1190 (2d Cir. 1993); that *Chambers* requires admission of exculpatory confessions by third parties, *Huffington v. Nuth*, 140 F.3d 572, 584 (4th Cir. 1998); that *Chambers* requires the admission of critical, exculpatory, and trustworthy evidence, *Turpin v. Kassulke*, 26 F.3d 1392, 1396 (6th Cir. 1994); that *Chambers* requires admission of reliable third-party confessions, despite the hearsay rule, where necessary to separate the guilt from the innocent, *United States v. Hall*, 165 F.3d 1095, 1113 (7th Cir. 1999); that *Chambers* requires admission of evidence that is highly relevant to a critical issue with adequate indicia of reliability, *Davis v. Zant*, 36 F.3d 1538, 1544 (11th Cir. 1994); and that *Chambers* holds that, where constitutional rights affecting ascertainment of guilt are implicated, hearsay rules may not be applied mechanically, *United States v. North*, 910 F.2d 843, 907 (D.C. Cir. 1990). Courts have also cited *Chambers* as standing for the right to present witnesses, *Gardner v. Barnett*, 199 F.3d 915, 919 (7th Cir. 1999), the right to present a defense, *Unites States v. Szur*, 289 F.3d 200, 217 (2d Cir. 2002), and the right to confront and cross-examine witnesses, *Mackey v. Dutton*, 217 F.3d 399, 407 (6th Cir. 2000), *Jones v. Goodwin*, 982 F.2d 464, 469 (11th Cir. 1993), *United States v. Begay*, 937 F.2d 515, 520 (10th Cir. 1991).

In this case, the Ninth Circuit Court of Appeals purported

to determine not only what the rule in *Chambers* was, but decided that its interpretation had been "clearly established" by *Chambers* for purposes of 28 U.S.C. § 2254(d)(1), which prohibits federal habeas corpus relief on a claim adjudicated by a state court on the merits unless the decision was "contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States") (emphasis added). The Ninth Circuit majority opinion interpreted *Chambers* as "clearly establishing" a general rule that requires the admission of hearsay if it is reliable and critical to the defense. The Court first characterized *Chambers* broadly:

> It is clearly established federal law, as determined by the Supreme Court of the United States, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense the exclusion of that statement may rise to the level of a constitutional due process violation.

Chia v. Cambra, 281 F.3d at 1037 (citing *Chambers*); Appendix D at 33. More significant, the majority then in fact treated *Chambers* as clearly establishing that a due-process violation indeed occurs whenever such evidence is excluded. *Id.*

But the rule, if any, established by *Chambers,* is anything but clear. As demonstrated above, this Court has questioned the meaning of *Chambers*, and the various Courts of Appeals are in deep disagreement over the meaning of *Chambers*. Resolution of this question is important because of the impact it has on the enforcement of the State's rules of evidence, and the absence of guidance on whether and when they must give way to a defendant's constitutional claim.

This case presents an important question on the meaning of the "clearly established" requirement in 28 U.S.C. § 2254(d)(1).

The Ninth Circuit Court of Appeals' ruling also necessarily presents the question of the meaning of "clearly established," under 28 U.S.C. § 2254. In *Williams v. Taylor*, 529 U.S. 362, 412 (2000), this Court briefly addressed the meaning of "clearly established." The Court said the phrase referred to "holdings, as opposed to the dicta," of the Court's decisions. 529 U.S. at 412. The Court also said that "clearly established" had only slight connection to the rule of *Teague v. Lane*, 489 U.S. 288 (1989), but that anything that would qualify as an "old rule" under *Teague* would be "clearly established" under § 2254(d). 529 U.S. at 412. Elsewhere in the opinion, the Court found the rule under *Strickland v. Washington*, 466 U.S. 668 (1984), to be clearly established. 529 U.S. at 391.

The Courts of Appeals have interpreted the meaning of "clearly established" in different ways. Several courts have simply concluded, based on the Court's statement in *Williams v. Taylor*, that the "clearly established" language merely codifies the holding of *Teague v. Lane*, except that what is a "new rule" is determined solely by Supreme Court precedent. *Campbell v. Rice*, 265 F.3d 878, 889 & n.6 (9th Cir. 2001); *Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000). Other courts have concluded that *Teague* analysis is similar but distinct. *Morris v. Reynolds*, 264 F.3d 38, 46 (2d Cir. 2001), *cert. denied sub nom., Reynolds v. Morris*, 122 S. Ct. 2381 (2002) (relying on *Williams v. Taylor* but asserting court's independent obligation to say what law is); *Daniels v. United States*, 254 F.3d 1180, 1195 (10th Cir. 2001) (finding it appropriate to look to *Teague* case law to decide whether something presents an issue of what is clearly established). Here, the Ninth Circuit Court of Appeals found a "clearly established" rule despite nationwide disagreement over the meaning of the concept. Indeed, it found "clearly established" law in *Chambers* without any mention of the basis for its

conclusion and without anything even approaching a *Teague*-like analysis.

Resolution by this Court of the first Question Presented is important. This case, first, involves an interpretation of the basic provisions of § 2254(d)(1), which itself lies at the heart of Congress' reform of habeas corpus in the Anti-Terrorism and Effective Death Penalty Act of 1996. It also implicates compelling issues of federalism, the integrity of state evidence rules, and the finality of state-court judgments. Contrary to this Court's disclaimer in *Chambers*, the Ninth Circuit has applied that case in a way that indeed infringes on the "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Chambers*, 410 U.S. at 302-03. In light of the important implications, and because the circuit courts are in conflict over these questions, this Court should grant certiorari on Question 1.

QUESTION 2

There is conflict among the circuits as to the meaning of "unreasonable application" in 28 U.S.C. § 2254 (d)(1), the standard used to review most State-court decisions.

This Court has explained that a review for an "unreasonable application" of federal law under 28 U.S.C. § 2254(d)(1) contemplates an inquiry into whether the decision is reasonable even if erroneous. *Williams v. Taylor*, 529 U.S. at 410-11; *accord Bell v. Cone*, 122 S. Ct. 1843, 1849 (2002). Many circuit courts have accordingly applied an objective test to see whether the state-court decision was reasonable. *Lorraine v. Coyle*, 291 F.3d 416, 422 (6th Cir. 2002); *Tucker v. Johnson*, 242 F.3d 617, 620-21 (5th Cir.), *cert. denied*, 533 U.S. 972 (2001); *Bell v. Jarvis*, 236 F.3d 149, 161-62 (4th Cir.), *cert. denied*, 122 S. Ct. 74 (2001); *Francis S. v. Stone*, 221 F.3d 100, 109-10 (2d Cir. 2000). Rejecting the approach of other circuits,

however, the Ninth Circuit Court of Appeals instead reviews state-court decisions for "clear error." Under this standard, it appears, habeas relief is granted whenever the federal court is "firmly convinced" the State court was wrong, without any apparent regard to whether the State's decision nevertheless was objectively reasonable. *Chia v. Cambra*, 281 F.3d at 1036-37; Appendix D at 33. Thus, this case presents the question of the meaning of "unreasonable application" of federal law, under § 2254(d)(1).

In *Williams v. Taylor*, this Court held that the "contrary to" and "unreasonable application" standards, set forth in 28 U.S.C. § 2254(d)(1), are two distinct standards of review. 529 U.S. at 404-05. A "run-of-the-mill" state-court decision applying a legal rule from this Court's cases to the facts of a particular case will be reviewed under the "unreasonable application" clause. *Id.* at 406-07. An "unreasonable application" is different from an "erroneous" or "incorrect" application of federal law. *Id.* at 411. Thus, a federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. The application must also be "unreasonable." *Id.* Analogizing to the *Teague* inquiry, the Court suggested that courts should engage in an "objective" inquiry as to whether a state court decision was unreasonable. *Id.* at 410.

Although the Court has given some guidance on "unreasonable application," "[t]he law is not yet fully formed on what it means for a state court to act unreasonably in light of clearly established federal law as defined by" this Court. *Kennaugh v. Miller*, 289 F.3d 36, 44 (2d Cir. 2002). Most Courts of Appeals have concluded *Williams* established an objective test in analyzing "unreasonable application." These circuit courts look at state-court rulings to determine whether the state court's application of clearly established federal law was "objectively" reasonable. *Lorraine v. Coyle*, 291 F.3d at 422; *Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002), *petition for cert. filed*, No. 01-10886 (June 13, 2002); *Tucker v.*

Johnson, 242 F.3d at 620-21; *Bell v. Jarvis*, 236 F.3d at 161-62 (rejecting the Ninth Circuit's approach); *Francis S. v. Stone*, 221 F.3d at 110 (same). These circuits have altogether rejected any supplementation of the objectively reasonable standard because, as noted in *Williams*, the term "unreasonable" is "a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Williams*, 529 U.S. at 410; *Neal v. Puckett*, 286 F.3d at 246 n.14 ("Imposing a surrogate 'unreasonableness' standard at this time would be a risky proposition, as our redefinition might prove unfaithful to the Supreme Court's intended meaning"); *see Kibbe v. DuBois*, 269 F.3d 26, 36 (1st Cir. 2001), *cert. denied*, 122 S. Ct. 1371 (2002) (unreasonable application standard means "outside the universe of plausible, credible outcomes"); *see also Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 891 (3rd Cir.), *cert. denied*, 528 U.S. 824 (1999) ("Notions of reasonableness abound in the law and are not ordinarily considered problematic, despite their imprecision").

Moreover, it is not settled "whether a federal court looks exclusively to the objective reasonableness of the state court's ultimate conclusion or must also consider the method by which the state court arrives at its conclusion." *Neal*, 286 F.3d at 244-45. Recently, the Fifth Circuit Court of Appeals held that a "federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining the decision" because the focus "should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal*, 286 F.3d at 246. Other circuits follow the same approach. *Id.* at 245 & n.12; *Long v. Humphrey*, 184 F.3d 758, 760-61 (8th Cir. 1999) (focus is only on reasonableness of the outcome); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998) (same); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1996) (en banc), *cert. denied*, 522 U.S. 819 (1997) (federal courts must not scrutinize a state court's method of reasoning); *cf. Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) (reasonableness is

determined by looking, in part, to the state court's process of reasoning).

Here, the Ninth Circuit has fundamentally altered the "objectively reasonable" standard set forth in *Williams*. In this case as in others, the Court of Appeals adopted a standard of "clear error," instead of one that focuses on reasonableness notwithstanding error. Moreover, in upsetting the conviction for "clear error," the Ninth Circuit engaged in a critique of the methodology and quality of the state court's analysis. The Ninth Circuit looked to the record and state trial court's opinion explaining the state court's decision to exclude the proffered evidence. The Ninth Circuit criticized the trial judge's distrust of post-arrest statements. *Chia v. Cambra*, 281 F.3d at 1040; Appendix D at 40. In this respect, the Ninth Circuit's rules for reviewing the state court's adjudication are in direct conflict with those of the First, Fifth, Seventh, and Eighth Circuits. In those Circuits, the federal courts review the state court's ultimate decision, not its explanations for that decision.

Thus, certiorari should be granted so this Court can clarify the "unreasonable application" standard and ensure uniformity among the circuit courts of appeals. This standard is applied in most federal habeas cases reviewing state-court decisions. Again, the Question Presented implicates compelling issues of federalism and the finality of state-court judgments.

QUESTION 3

This case presents the important question of whether the State court "unreasonably applied" *Chambers*.

As noted above, *Chambers* involved "an exercise in highly case-specific error correction." *Montana v. Egelhoff*, 518 U.S. at 52 (Scalia, J., plurality opinion). Although this case presents facts different from *Chambers* on almost every significant point, the Ninth Circuit Court of Appeals found that the state court "unreasonably applied" *Chambers* when it decided to exclude

Wang's statements. Thus, this case presents an important question of law, bound up in the question of the proper scope of § 2254(d) habeas corpus review, as to whether the State court in this case "unreasonably applied" *Chambers*.

In deciding that McDonald's out-of-court statements were reliable, this Court noted that McDonald had made his statements spontaneously, to close friends, shortly after the murder, and that the statements were corroborated by other evidence and were unquestionably against McDonald's interests. Additionally, McDonald was present in court and subject to cross-examination by the State. *Chambers*, 410 U.S. at 298-301. And it was his acknowledgment of guilt as the sole killer that itself would have necessarily exculpated Chambers.

Here, in contrast, Wang's hearsay statements were made in custody, in response to police interrogation. And it was not Wang's acknowledgment of his own guilt as only one of the plotters that the defense sought as exculpatory of Chia. *See Williamson v. United States*, 512 U.S. 594, 599-600 (1994) (only portion of statement that is incriminating is admissible as declaration of interest under Federal Rules of Evidence). Chia's defense instead was seeking Wang's further hearsay, to the extent it ventured beyond his admission of his own guilt in the plot and affirmatively alleged that Chia had not been involved and had tried to dissuade Wang from participating. In addition, unlike the hearsay declarant in *Chambers*, Wang had asserted his constitutional rights and thus was not available for cross-examination about his hearsay statements by the State. Further, apparently unlike the defendant in *Chambers*, Chia was not relegated to hearsay as the only means of presenting his evidence. Nothing prevented Chia from testifying directly about his own conduct; he did not need to rely upon Wang's hearsay statements about it to produce that information to the jury.

In addition, evaluation by the trial court was different in this case from that in *Chambers*. As noted above, the trial court in *Chambers* applied the state hearsay rule "mechanistically" to exclude statements that were nonetheless reliable and critical to

the defense. 410 U.S. at 302. Here, the trial court, reviewed *Chambers* and specifically addressed the reliability of the statements and the importance of the statements to the defense. But the Ninth Circuit Court of Appeals found the trial court had "mechanistically," and therefore erroneously, applied the rules of evidence to deny Chia his constitutional rights. *Chia v. Cambra*, 281 F.3d at 1040; Appendix D at 40.

In the end, the Ninth Circuit Court of Appeals' decision to reverse and remand this case amounts to basic disagreement with the California courts. The Ninth Circuit's entire analysis is in conflict with the "objective unreasonableness" standard set forth in *Williams*, because it applies a different test of clear error. Accordingly, this Court should grant certiorari on the important question of whether the state court unreasonably applied *Chambers*.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Dated: July 18, 2002

Respectfully submitted,

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INDEX TO APPENDICES

APPENDIX A: Report and Recommendation of United States Magistrate Judge

APPENDIX B: Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge

APPENDIX C: Judgment of the United States District Court

APPENDIX D: Opinion of the Ninth Circuit Court of Appeals

APPENDIX E: Order of the Ninth Circuit Court of Appeals

APPENDIX A

FILED
CLERK, U.S. DISTRICT COURT
MAY 20 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SU CHIA, Petitioner, vs. STEVEN CAMBRA, JR., Warden, et al., Respondents.	)	No. CV 97-5199 RSWL (RZ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California, the undersigned submits this Report and Recommendation to the Honorable Ronald S.W. Lew, United States District Judge.

The undersigned recommends that the Petition for Writ of Habeas Corpus be dismissed with prejudice.

I.

On November 1, 1988, in the Los Angeles County Superior Court, a jury convicted petitioner Michael Su Chia of two counts of first degree murder in violation of CALIFORNIA PENAL CODE § 187(a), one count of attempted murder in violation of CAL. PENAL CODE §§ 664/187(a), one count of

second degree robbery in violation of CAL. PENAL CODE § 211, and one count of conspiracy to commit robbery with 11 overt acts in violation of CAL. PENAL CODE § 182. Clerk's Transcript ("CT") 842-847; Reporter's Transcript ("RT") 2212-2217. The jury also found true the allegations that during the commission of the murders and the robbery, a principal was armed with a firearm in violation of CAL. PENAL CODE § 12022(a) (CT 842-845; RT 2212-2214), and that during the commission of the robbery Chia took government property having a value in excess of $25,000, in violation of CAL. PENAL CODE § 12022.6(a). CT 845; RT 2214. The Court sentenced Chia to 25 years to life for each of the murder counts, nine years for the attempted murder, and two years for the special allegations, with the sentences to run consecutively. CT 855; RT 2264-2267. The other sentences were imposed but stayed. *Id.*

Chia appealed his conviction to the California Court of Appeal, which affirmed the judgement in an unpublished opinion on May 30, 1991. Return to Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities, Exhs. B and C. Chia then filed a petition for review in the California Supreme Court, which denied the petition on September 4, 1991. Return, Exhs. D & E. Six years later, Chia filed a petition for writ of habeas corpus in the California Supreme Court in which he raised three of the same issues raised previously, and the California Supreme Court denied that petition without explanation. Return, Exhs. F & G.

Chia filed the instant federal petition on July 16, 1997, in which he asserts three grounds for habeas corpus relief. In Ground One, Chia argues that the trial court deprived him of crucial defense evidence by excluding hearsay statements. Petition at 8-25. In Ground Two, Chia argues that "the trial court erred in admitting into evidence the four involuntary statements made by petitioner during his six-day pre-arraignment detention, in violation of the Fifth, Sixth, and [F]ourteenth Amendments." Petition at 18. In Ground Three,

Chia argues that the trial court erred in refusing to instruct the jury on the lesser included offenses of manslaughter and/or second degree murder in violation of his Sixth and Fourteenth Amendment rights. Petition at 26-27. Grounds One and Two lack merit and Ground Three fails to state a federal claim cognizable on habeas corpus review.

II.
STANDARD OF REVIEW

Chia's claims must be considered in light of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, which "worked substantial changes to the law of habeas corpus." *Moore v. Calderon*, 108 F.3d 261, 263 (9th Cir.), *cert. denied*, 117 S.Ct. 2497 (1997). Of particular importance here is 28 U.S.C. § 2254(d), which provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -- [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 1999).

Chia raised his three claims before the California Supreme Court in his Petition for Review and his petition for habeas corpus, and both were denied without a written opinion. In each case, the California Supreme Court's decision is

presumed to be on the merits even though it is not accompanied by an explanation. *Hunter v. Aispuro*, 982 F.2d 344, 348 (9th Cir. 1992). To determine the basis for the Supreme Court's decision under these circumstances, this Court looks back to the Court of Appeal decision on the merits. The California Court of Appeal did fully explain its reasoning regarding the three issues raised here.

III.
THE STATE DECISION, HOLDING THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO ADMIT HEARSAY TESTIMONY, IS NOT CONTRARY TO, NOR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES

Chia argues that the trial court deprived him of his rights under the Sixth and Fourteenth Amendment by refusing to admit hearsay testimony of an unavailable co-conspirator, William Wang. Petition at 8-9. Specifically, Chia argues that Wang's statements to police were crucial to Chia's defense because they demonstrated that Chia tried to dissuade Wang from committing the planned crimes. Petition at 10. According to Chia, the trial court should have permitted Chia to introduce Wang's statements to police under the "statement against penal interest" exception to the hearsay rule. CAL. EVID. CODE § 1230.[1/] Petition at 9. The trial court's exclusion of hearsay

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1. Section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the

statements did not violate fundamental fairness.

"A state court's evidentiary ruling is grounds for federal habeas corpus relief only if it renders the state proceeding so fundamentally unfair as to violate due process." *Bueno v. Hallahan*, 988 F.2d 86, 87 (9th Cir. 1993); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991) (re-emphasizing that federal habeas relief does not lie for errors of state law). In evaluating whether exclusion of evidence rendered a trial fundamentally unfair, this Court considers: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990); *see Bueno*, 988 F.2d at 87. The court must balance these factors with the substantial state interest in preserving orderly trials, judicial efficiency, and excluding unreliable or prejudicial evidence. *Miller v. Stagner*, 757 F.2d 988, 995, *amended*, 768 F.2d 1090 (9th Cir. 1985). Additionally, the state's compelling interest in the application of the hearsay rule can be outweighed only by the most urgent considerations. *Perry v. Rushen*, 713 F.2d 1447, 1453 (9th Cir. 1983). Applying the balancing test set out

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> declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

CAL. EVID. CODE § 1230 (West 1999).

in *Tinsley*, this Court concludes that the exclusion of Wang's statements did not violate fundamental fairness.

The proffered defense testimony consisted of post-arrest statements given to law enforcement officers by a co-conspirator, William Wang, concerning Chia's involvement in the crimes. *See* CT 699-712. In denying Chia's motion to admit the hearsay statements, the trial court noted that while some of Wang's statements exculpated Chia and some did not, it was not uncommon for people who are confederates to try and shield one another from liability after they had been arrested. RT 54-55, 64. The trial court concluded that Wang's statements were not disserving enough to Wang's own interest and they lacked sufficient trustworthiness and indicia of reliability to fall within the hearsay exception. RT 54-55, 66-67. The California Court of Appeal Court agreed, stating:

> Chia was not interested in the admission of the portions of Wang's testimony which specifically disserve Wang's interests (such as Wang's confession of his involvement in the "rip-off" and shooting of two DEA agents). Rather, Chia wanted to use Wang's collateral assertions that Chia was not involved in the actual shooting and that Chia had tried to talk Wang out of participating in the enterprise at all. For this reason, Wang's statements were properly excluded. [citations omitted.]
>
> Moreover, there were insufficient indicia of reliability. Wang's statements were made post-arrest and that fact alone makes them inherently suspect . . . . As the trial court aptly noted, it is not uncommon for someone caught (quite literally) with a smoking gun, as Wang was is in this case, to make statements to protect an arguably less culpable confederate. And there was no evidence at all to corroborate Wang's statements about Chia's purported uninvolevment.
>
> Finally, as the trial court also noted, Wang's

> statements were not in any event particularly exculpatory. They show clearly that Chia knew of the "rip off" plan, including the murders, and that he followed Wang around to help watch out for Wang. There was neither error nor prejudice in the exclusion of the statements.

Return, Exh. C at 147-148.

Under *Tinsley*, this Court finds Wang's testimony was minimally reliable, and hence its exclusion did not render the trial fundamentally unfair. Specifically, Chia has pointed to nothing in the record that requires this Court to disregard the state court's finding, nor has he demonstrated that Wang's statement was otherwise reliable.[2/] *Tinsley*, 895 F.2d at 530. Because Wang's statements demonstrate that Chia knew of the plan to rob and murder beforehand, the slight value of Wang's testimony to Chia's defense did not outweigh the state's interest in excluding evidence. *See* RT 64-65. Therefore, Chia has not shown that his interest in the admission of Wang's post-arrest hearsay statement outweighs the state's interest in its exclusion under the hearsay rule and there was no due process violation.

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2. Chia attempts to bring himself within the holding of *Washington v. State of Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Petition at 13. That case does not apply. In *Washington*, the Supreme Court struck down a Texas statute which prohibited "persons charged a principals, accomplices, or accessories" in the same crime, from testifying on behalf of the defense in each other's case. *Id.* at 16 n. 4, 87 S.Ct. at 1922 n. 4. The Court criticized the arbitrary and mechanical manner in which the rule had been applied to bar the testimony of the accomplice. *Id.* at 22-23, 87 S.Ct. at 1925. However, in the instant case, the trial court specifically found that the testimony at issue was untrustworthy. RT 54-55, 64. *See Frierson v. Calderon*, 968 F. Supp. 497, 509 n.9 (C.D. Cal. 1997).

See Galindo v. Ylst, 971 F.2d 1427, 1429 (9th Cir. 1992).

Moreover, Wang's statements were excluded due to the state court's finding that the testimony was not reliable, a finding that is supported by the state court record, and presumed to be correct under 28 U.S.C. § 2254(d). *See, e.g., Galindo*, 971 F.2d at 1429 ("The state court's resolution of this factual question [whether the victim was under an immediate sense of impending death or not] is presumptively correct."); *Frierson*, 968 F. Supp. at 509-510 (holding that the state court's determination that testimony was not trustworthy is presumed to be correct, and thus absent contrary evidence there was no due process violation in its exclusion). Accordingly, no constitutional violation resulted from the trial court's exclusion of these hearsay statements, *see Tinsley*, 895 F.2d at 530, and the state court adjudication was not contrary to, or an unreasonable application of, clearly established Federal law as determined by the Supreme Court.

IV.
THE STATE DECISION, HOLDING THAT CHIA'S CONFESSION WAS VOLUNTARY AND THAT HE VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS, IS NOT CONTRARY TO, NOR AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES

Chia next argues that the trial court erred in admitting four involuntary statements in violation of the Fourteenth Amendment. Similarly, Chia argues that he did not voluntarily, knowingly, and intelligently waive his Miranda rights. Petition at 18-25. These claims are without merit.

A. Chia's Confession was Voluntary Under the Fourteenth Amendment

In evaluating the voluntariness of a confession, the Court must inspect "whether, under the totality of circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Derrick v. Peterson*, 924 F.2d 813, 817 (9th Cir. 1990) (citing *Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985). The test for determining whether a confession is voluntary is "whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1083 (1998) (citing *Derrrick*, 924 F.2d at 817); *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988); *Evans v. Demosthenes*, 902 F. Supp. 1253, 1261 (D. Nev. 1995).

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522, 93 L.Ed.2d 473 (1986). "[P]ersonal characteristics of the defendant are constitutionally irrelevant absent proof of coercion." *Derrick*, 924 F.2d at 818 (citing *United States v. Rohrbach*, 813 F.2d 142, 144 (8th Cir. 1987)). Consequently, Chia's age at the time of arrest (20) and his lack of education are relevant to the due process inquiry only if the court first concludes that the police's conduct was coercive. *Derrick*, 924 F.2d at 818.

Chia argues that the atmosphere of his questioning was coercive because, prior to his custodial interrogation, police officers were both physically and verbally abusive, thus rendering him fearful of invoking his rights. Petition at 19. Chia also argues that his confession was involuntary because the police failed to permit his brother and his attorney to be present during the interrogation. Petition at 20. This Court finds that the atmosphere surrounding the questioning of Chia

was not coercive.

It is important to observe that Chia does not argue in the instant petition that his statements should be excluded because the nature of the detention was impermissible under *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.2d 54 (1975) (holding that the Fourth Amendment requires the police to take a criminal suspect before a neutral magistrate after "a brief period of detention to take the administrative steps incident to arrest"), an argument addressed by the respondents. Return, at 29-31. Regardless, since Chia has had a full and fair hearing on the issue of an arrest (*see* Return, Exh. C at 148), he could not obtain federal habeas review of a claim that his arrest and custody were illegal. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1967).

However, Chia's arguments concerning the admissibility of his confession at trial are cognizable on habeas review. *Withrow v. Williams*, 507 U.S. 680, 687 113 S.Ct. 1745, 1750, 123 L.Ed.2d 407 (1993) (holding that *Stone* does not apply to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). While cognizable, these claims are nevertheless without merit.

First, Chia argues that he was physically and verbally abused by police officers prior to his interrogation. Under the AEDPA, a federal court shall presume that the determination of factual issues made by a state court is correct, and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The California Court of Appeal found that there was no coercion, stating:

> We find nothing in the record to support Chia's related contention that his statement resulted from actual coercion. No promises or inducements were made to Chia and it is undisputed that he was repeatedly advised and reminded of his Miranda

> rights at each interview and repeated waivers were given. The trial court apparently gave Chia's testimony — that he waived his rights because he feared that, although he was not a minor, he would not qualify for appointed counsel because his parents, who were living in Taiwan, were wealthy — the weight to which it was entitled. We summarily reject Chia's suggestion that we should infer coercion because he was isolated from friends and relatives (there is no suggestion that he asked to see anyone), because he was physically or mentally fatigued (an argument unsupported by the record) or because he was somehow unduly susceptible to coercion.

Return, Exh. C at 153-154. An independent review of the record confirms this finding. Aside from petitioner's own uncorroborated testimony that he was physically abused at the time of his arrest (RT 204-205), there is no evidence that Chia was subjected to any sort of force, pressure, harassment, coercion or trickery to get him to make incriminating statements, either before or during the interrogation. Nor was Chia promised anything. RT 344-345. In fact, the trial court indicated that "there is nothing here from which I could conclude . . . that the confession was involuntary." RT 438. Two police officers testified at the suppression hearing that no such physical or verbal abuse occurred at the time of arrest. RT 252-253; 281-283. Accordingly, this Court finds that, based on the facts determined by California Court of Appeal, there was no atmosphere of coercion.

Next, Chia argues that his confession was involuntary because the police failed to permit his brother and his attorney to be present during the interrogation. Petition at 20. However, Chia does not direct the Court to a case, nor has the undersigned found one, requiring that a relative be present prior to a confession. *See, e.g., Derrick*, 924 F.2d at 819 (holding that police's "failure" to contact defendant's relatives was not a form

of coercive misconduct). Nor does the record indicate that at any time during the investigation did Chia request the presence of his lawyer. In fact, he repeatedly waived his right to one. RT 213, 237-238; Return, Exh. C at 153-154.

Lastly, because there was no police coercion, Chia's personal characteristics, such as the fact that he was twenty years of age and had a limited education, are not relevant to the due process voluntariness inquiry. *Connelly*, 479 U.S. at 167, 107 S.Ct. at 522; *Derrick*, 924 F.2d at 818; *Rohrbach*, 813 F.2d at 144 (8th Cir. 1987).

Therefore, the California Court of Appeal's conclusion that Chia's confession was voluntary under the due process clause of the Fourteenth Amendment is not contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d).

B. Chia's Waiver of His Miranda Rights was Voluntary, Knowing and Intelligent

Chia also argues that his waiver of his Miranda rights was invalid because it was not voluntary, knowing and intelligent. Petition at 23-24. This, too, is without merit. "There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the Miranda waiver context than in the Fourteenth Amendment confession context." *Derrick*, 924 F.2d at 820 (citing *Connelly*, 479 U.S. at 169-170, 107 S.Ct. at 523). Therefore, because this Court already has concluded that Chia's confession was voluntary under the Fourteenth Amendment (Part IV(A), *supra*.), this Court also concludes that his waiver of his Miranda rights was voluntary. *Derrick*, 924 F.2d at 820; *see, e.g., Evans*, 902 F. Supp. at 1261 ("If defendant's confession was voluntary, then so, by definition, was his waiver.").

The California Court of Appeal found that Chia was advised and readvised of his Miranda rights a number of times, and each time he waived those rights. Return, Exh. C at 153-

154. The record supports this finding. RT 337-338, 342, 343, 379, 380. Chia admitted at the pretrial hearing that he understood those rights. RT 237. Further, during the interrogation, there is no indication from the record that he displayed any signs of incompetency. *See, e.g., Amaya-Ruiz*, 121 F.3d at 495.

Chia's waiver of Miranda was also "knowing and intelligent." Chia, who asserts he is not fluent in English, maintains that he could not understand the circumstances surrounding the waiver. Petition 19, 22. Additionally, he claims he was unable to understand his Miranda rights and waiver because he is a "high school drop out." Petition at 19. This Court also rejects these two claims.

"[A]ny language difficulties encountered by the defendant are considered to determine if there has been a valid waiver." *United States v. Bernard S.*, 795 F.2d 749, 751 (9th Cir. 1986). Here, however, Chia testified at the pretrial hearing that at the time of his arrest he had been in the United States for 8 years, attended school, and was able to speak, read, and understand English. RT 229. Furthermore, an INS agent testified that, during an interview, Chia had no trouble communicating in English. RT 293.

Additionally, the fact that Chia is a high school drop-out does not mean he does not have the ability to knowingly waive his Miranda rights. *See Derrick*, 924 F.2d at 824 (sixteen-year-old with mental age of nine-year-old and I.Q. of 62 capable of understanding and waiving Miranda rights); *United States v. Bautista-Avila*, 6 F.3d 1360, 1365-1366 (9th Cir. 1993) (valid waiver by defendant with a sixth-grade education). Considering the circumstances, Chia acted in a way that only can give rise to an inference that he knowingly, voluntarily and intelligently waived his Miranda rights.

In sum, Chia's confession was voluntary and he voluntarily, knowingly, and intelligently waived his Miranda rights. Accordingly, the California Court of Appeal's adjudication of this claim was not contrary to, nor an

unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d).

V.
CHIA'S CLAIM ALLEGING THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT ON A LESSER INCLUDED OFFENSE DOES NOT RAISE A FEDERAL QUESTION

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States." 28 U.S.C. § 2254(a); *see also* 28 U.S.C. § 2241(c)(3); *Estelle*, 502 U.S. at 72, 112 S.Ct. at 103; *Bonin v. Calderon*, 77 F.3d 1155, 1161 (9th Cir.), *cert. denied*, 489 U.S. 1091 (1996); *Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990); *Jammal v. Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991); *see also Dugger v. Adams*, 489 U.S. 401, 409, 109 S.Ct. 1211, 1216 (1989) ("the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution").

In his third ground for relief, Chia contends that the trial court erred when it failed to instruct the jury sua sponte regarding manslaughter and/or second degree murder as a lesser-included offense. Petition at 26-27.

As noted in Part II, *supra.*, under the AEDPA, a petitioner raising a question of law must demonstrate that the State court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d). Here, the Court of Appeal held it was not error to fail to instruct sua sponte on the lesser included offense because there was insufficient evidence to warrant these instructions and thus Chia was not entitled to such an instruction. Return, Exh. C at 155-156. While the Supreme Court has held that a trial court's failure to instruct on

a lesser included offense in a capital case is constitutional error if there is evidence to support the instruction, *Beck v. Alabama*, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390, 65 L.Ed.2d 392 (1980), it expressly has reserved the question of the availability of habeas relief for failure to give a lesser included offense instruction in a noncapital case. *See Beck*, 447 U.S. at 638, n. 14, 100 S.Ct. at 2390 n. 14. "There is no settled rule of law on whether *Beck* applies to noncapital cases . . . ." *Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995), *aff'd in part* and *vacated in part*, 121 F.3d 1248 (9th Cir. 1997). Therefore, a failure to instruct sua sponte on the lesser included offense of second degree murder in this non-capital case "did not violate clearly established Federal law as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254(d). *See also Furman v. Wood*, 169 F.3d 1230, 1999 WL 170175 (9th Cir. March 30, 1999) (writ of habeas corpus may issue only when state court decision is contrary to an authoritative decision of the Supreme Court, and Federal court of appeals decisions are irrelevant to the analysis). Even if considered, circuit-level authority does not help Chia, for it makes clear that such a claim presents no federal question. *See Windham v. Merkle*, 163 F.3d 1092, 1099-1101 (9th Cir. 1998) ("The failure of a state trial court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question."); *Turner*, 63 F.3d at 819; *see James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976) ("The failure of a trial court to instruct the jury on a lesser included offense does not present a federal question cognizable in a federal habeas corpus proceeding.").

Moreover, Chia's argument fails because it would require application of a new rule of law in habeas corpus case in violation of the rule originally laid down in *Teague v. Lane*, 489 U.S. 288, 299-300, 109 S.Ct. 1060, 1069, 103 L.Ed.2d 334 (1989); *see Turner*, 63 F.3d at 819 ("With the intercircuit split on whether the lack of a lesser included offense instruction in a noncapital case presents constitutional error, any finding of

constitutional error would create a new rule, inapplicable to the present case under *Teague*."); *see also Jones v. Hoffman*, 86 F.3d 46, 48 (2d Cir. 1996). The narrow exceptions to the non-retroactivity rule of *Teague* are not applicable in the instant case. *See Jones*, 86 F.3d at 48 ("The lesser-included offense rule does not decriminalize a particular class of conduct"); *Andrews v. Deland*, 943 F.2d 1162, 1187 (10th Cir. 1991) ("The rule [in Beck] is not such a 'watershed' rule as to fit within the second [Teague] exception.").

Therefore, Chia has not asserted a constitutional error upon which habeas relief could be granted.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the District Court issue an Order accepting and adopting this Report and Recommendation and directing that Judgment be entered dismissing this action with prejudice.

DATED: May 19, 1999

/S/

RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE

LODGED
CLERK, U.S. DISTRICT COURT
MAY 20 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SU CHIA,	)	No. CV 97-5199 RSWL (RZ)
	)	
Petitioner,	)	
	)	JUDGMENT
vs.	)	
	)	
STEVEN CAMBRA,	)	
JR., Warden, et al.,	)	
	)	
Respondents.	)	
	)	

This matter came before the Court on the Petition of Michael Su Chia for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and having accepted the Report and Recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED:

RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

LODGED
CLERK, U.S. DISTRICT COURT
MAY 20 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SU CHIA,	)	No. CV 97-5199 RSWL (RZ)
	)	
Petitioner,	)	
	)	ORDER ADOPTING
vs.	)	FINDINGS, CONCLUSIONS
	)	AND
STEVEN CAMBRA,	)	RECOMMENDATIONS OF
JR., Warden, et al.,	)	UNITED STATES
	)	MAGISTRATE JUDGE
Respondents.	)	
	)	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of United States Magistrate Judge, and has considered de novo any portions of the Report as to which objections have been filed. The Court accepts the Magistrate Judge's Report and adopts it as its own findings and conclusions.

DATED:

RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

APPENDIX B

LODGED
CLERK, U.S. DISTRICT COURT
MAY 20 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
JULY 2 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JULY 6 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SU CHIA,	)	No. CV 97-5199 RSWL (RZ)
	)	
Petitioner,	)	
	)	ORDER ADOPTING
vs.	)	FINDINGS, CONCLUSIONS
	)	AND
STEVEN CAMBRA,	)	RECOMMENDATIONS OF
JR., Warden, et al.,	)	UNITED STATES
	)	MAGISTRATE JUDGE
Respondents.	)	
_____	)	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Report and

Recommendation of United States Magistrate Judge, and has considered de novo any portions of the Report as to which objections have been filed. The Court accepts the Magistrate Judge's Report and adopts it as its own findings and conclusions.

DATED: JUN 30 1999

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

RONALD S.W. LEW

RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

APPENDIX C

LODGED
CLERK, U.S. DISTRICT COURT
MAY 20 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
JULY 2 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
JULY 6 1999
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL SU CHIA,	)	No. CV 97-5199 RSWL (RZ)
	)	
Petitioner,	)	
	)	JUDGMENT
vs.	)	
	)	
STEVEN CAMBRA,	)	
JR., Warden, et al.,	)	
	)	
Respondents.	)	
_____	)	

This matter came before the Court on the Petition of Michael Su Chia for a writ of habeas corpus. Having reviewed

the Petition and supporting papers, and having accepted the Report and Recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: JUN 30 1999

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

RONALD S.W. LEW

RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SU CHIA, Petitioner-Appellant, v. STEVEN CAMBRA, Jr., Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 99-56361 D.C. No. CV-97-05199-KMW OPINION

Appeal from the United States District Court
for the Central District of California
Kim McLane Wardlaw, District Judge, Presiding

Argued and Submitted
December 7, 2000—Pasadena, California

Filed February 27, 2002

Before: Dorothy W. Nelson, Melvin Brunetti and
Alex Kozinski, Circuit Judges.

Opinion by Judge Dorothy W. Nelson;
Dissent by Judge Brunetti

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed a judgment of the district court. The court held that trial court's exclusion of hearsay statements that directly inculpate the declarant and exculpate the defendant violates the defendant's constitutional right to present a defense, when the statements are crucial to the defendant's defense of discouraging the crime charged, and the statements are the only means of establishing the defendant's role.

In 1988, a Los Angeles County Superior Court jury convicted appellant Michael Chia of two counts of first degree murder and one count of attempted murder, as well as counts of second degree robbery and conspiracy to commit robbery. Chia's conviction stemmed from a Drug Enforcement Agency (DEA) sting operation in which two DEA agents were killed when the targets of the sting operation decided to rob and murder the agents instead of consummating the drug deal. Chia, however, was not accused of being one of the shooters or of being present when the agents were murdered. Rather he was prosecuted as a co-conspirator, an aider and abettor, and an accomplice. Chia's defense hinged on explaining his relationship to the shooters and his interactions with them in the days and hours before the murders. Chia contended that, far from being a co-conspirator, he tried to talk one of the shooters, his good friend William Wang, out of the plot. In support of his version of events, Chia sought to introduce at trial statements made by Wang to police after the shooting. Wang refused to testify at Chia's trial and Chia also declined to take the stand.

Wang had made four separate statements to investigators. In his first statement, made to DEA agents before he was wheeled into surgery in danger of death, Wang said that he did not know of anyone other than himself, Frank Kow, and Mike Chen involved in the actual shooting. In his second statement, later that afternoon, Wang admitted that he had planned to rob

the "drug dealers" in conjunction with Kow and Chen. In his third statement, given later that evening, Wang said that Chia told him not to go through with the plan and that Chia was not involved in the plot and was not going to get any drugs or money. In his fourth and final statement, given to the FBI two days after the shooting, Wang confessed that not only did he plan to rob the agents but that he knew in advance that Kow planned to kill the agents. Wang stated again that Chia told him not to go through with the plot. The trial court excluded the statements as hearsay. The California Court of Appeal affirmed. The federal district court denied Chia's habeas corpus petition.

Chia appealed, claiming that the trial court's exclusion of Wang's statements violated Chia's constitutional right to present a defense.

[1] Pursuant to the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal habeas court may grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court only if the state court adjudication resulted in a decision that (1) was contrary to clearly established federal law as determined by the Supreme Court of the United States, or (2) involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States. **[2]** Under AEDPA, a court must reverse a state court's decision as involving an unreasonable application of clearly established federal law when its independent review of the legal question leaves it with a firm conviction that one answer, the one rejected by the state court, was correct and the other, the application of the federal law that the court adopted, was erroneous.

[3] It is clearly established federal law, as determined by the Supreme Court of the United States, that when a hearsay statement bears persuasive assurances of trustworthiness and is

critical to the defense the exclusion of that statement may rise to the level of a constitutional due process violation. **[4]** When deciding whether an evidentiary rule violates the Due Process Clause or the Sixth Amendment, courts apply a five-part balancing test. The factors considered are (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense.

[5] With respect to Wang's third statement, on the paramount issue of reliability (the second factor of the balancing test), the self-inculpatory nature of Wang's statements weighed in favor of admission. The very words in this statement that exculpated Chia were highly inculpatory of Wang. **[6]** Self-inculpatory statements have long been recognized as bearing strong indicia of reliability.

[7] The first and fifth factors of the balancing test also weighed in Chia's favor. The issue is whether his behavior was aimed at facilitating and encouraging the crime as the state contended, or at discouraging the crime and protecting his friend from harm. This question underlay Chia's entire defense, and Wang's statements were extremely probative on this point.

[8] The third factor of the balancing test was also satisfied. If Wang's statements were introduced, the jury would be called upon to weigh the plausibility of the state's theory against Wang's testimony, which explained the events in a way that would not subject Chia to criminal liability. **[9]** The fourth factor was also satisfied. Chia was left with Wang's statements as the only means of establishing his role. **[10]** Chia's third statement squarely satisfied all of the factors in the balancing test, and clearly should have been admitted.

[11] Taken as a whole, the four statements bore strong indicia of reliability and were crucial to Chia's defense. The state's interest in excluding the evidence was minimal while the importance of the evidence was great. A mistake was committed and Wang's statements should have been admitted into evidence.

[12] A writ of habeas corpus is properly granted for a state court decision involving an unreasonable application of clearly established federal law. **[13]** Despite its clear statement of Chia's position, the trial judge made the decision that Wang's statements did not clearly help the defense. This conclusion was unreasonable. The statements were clearly helpful to Chia. If believed by the jury, they exonerated Chia. **[14]** The trial court's conclusion that Wang's statements were inadmissible under Chambers was clear error and an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. **[15]** The decision of the district court had to be reversed.

Judge Brunetti dissented, writing that because Wang's statements did not bear sufficient indicia of reliability, the California trial court's exclusion of these statements as inadmissible hearsay did not deny Chia his due process rights.

COUNSEL

James Dirks, Sacramento California, for the petitioner-appellant.

Valerie A. Baker, Deputy Attorney General, State of California, Los Angeles, California, for the respondents-appellees.

OPINION

D.W. NELSON, Circuit Judge:

On November 1, 1988, a Los Angeles County Superior Court jury convicted Michael Su Chia ("Chia") of two counts of first degree murder and one count of attempted murder, as well as counts of second degree robbery and conspiracy to commit robbery. Chia's conviction stemmed from a Drug Enforcement Agency ("DEA") sting operation that went tragically wrong. Two DEA agents were killed when the targets of the sting operation decided to rob and murder the agents instead of consummating the drug deal. Chia, however, was not accused of being one of the shooters or of being present when the agents were murdered. Rather he was prosecuted as a co-conspirator, an aider and abettor, and an accomplice.

Chia's defense hinged on explaining his relationship to the shooters and his interactions with them in the days and hours before the murders. Chia contends that, far from being a co-conspirator, he tried to talk one of the shooters, his good friend William Wei Wang ("Wang"), out of the plot. In support of his version of events, Chia sought to introduce at trial statements made by Wang to police after the shooting. The trial court excluded the statements as hearsay. Chia's direct appeals claiming that the trial court's exclusion of Wang's statements violated Chia's constitutional right to present a defense were denied as were his collateral attacks on his conviction in state court and in the district court below.

The crux of the matter before us is the reliability of Wang's statements. If Wang's statements bear sufficient indicia of reliability and were crucial to Chia's defense, then it was error for the trial court to exclude them. *United States v. Lopez-Alverez*, 970 F.2d 583, 588 (9th Cir. 1992); *People v. Kaurish*, 802 P.2d 278, 308 (Cal. 1990). The evidence is overwhelming that the statements were both reliable and crucial to Chia's defense. We are left with a definite and firm conviction that a

mistake was committed and that Chia's fundamental due process rights were violated when the trial court excluded Wang's statements.

We reverse the judgment of the district court and remand with instructions to grant the writ of habeas corpus unless the State grants Michael Chia a new trial within a reasonable time.

I.

On the evening of February 4, 1988, DEA agents were watching the apartment of Frank Kow ("Kow"), a major drug dealer. At 10:10 p.m. Michael Chia's black Mitsubishi pulled up in front of Kow's apartment complex. Chia and his friend, William Wang, got out of the Mitsubishi. Wang took a pistol from the rear of the car and walked into the apartment complex. A few minutes later, Chia went up the complex stairs, paced on the landing, and then stood at the top of the stairs for several minutes until Wang came out. Wang and Chia walked back to the Mitsubishi together. Later that night, Wang and Chia were seen together at a local night club.

The next day drug dealer Kow called DEA agents who had been posing as buyers and leading him on towards a major sting. Kow told the agents to meet him at 11:00 a.m. at a local restaurant. That same morning, DEA agents again saw Chia's black Mitsubishi at Kow's apartment, first at 10:30 a.m. and a second time at 11:30 a.m. Shortly after 11:30 a.m. other DEA agents saw the Mitsubishi enter the parking lot of the restaurant where the rendezvous between Kow and the DEA agents posing as drug buyers was scheduled. Chia got out of his car and talked to Wang and to Mike Chen ("Chen"), who had both arrived at the restaurant parking lot. After speaking with Wang and Chen, Chia entered the restaurant. A few minutes later he reemerged, got back into his car and drove to the restaurant entrance where he conversed briefly with Kow. Chia then drove

into a nearby alley. After a brief time, he drove back into the parking lot, stayed for a few minutes, drove out of the lot again, and then reentered.

Meanwhile, three DEA agents posing as drug dealers got into a Volvo in the restaurant parking lot with Kow and drove off. The agents carried a bag containing $80,000 in cash with which to consummate the sting buy from Kow. Kow did not know that the three "drug dealers" were actually DEA agents, and the agents did not know that Kow planned to rob them of the $80,000 rather than sell them drugs. Kow's partners in the plot to rob the agents, Chen and Wang, followed behind the Volvo in a red Nissan. After driving a short while, Kow directed the agents to pull over. Kow got out of the Volvo, stood beside the car, and pointed a gun at the agents. The agents raised their hands. Chen and Wang, in the Nissan, pulled up behind the stopped Volvo. Wang got out of the Nissan, drew his gun, and joined Kow standing next to the Volvo containing the three agents, still sitting with their hands up. Chen remained behind the wheel of the Nissan, ready to make a quick getaway. The agents gave the money bag to Wang and Kow. Wang and Kow then opened fire on the agents. Two of the agents were killed and the third was seriously wounded.

Kow and Wang fled the scene in the Nissan with Chen behind the wheel. Other DEA agents who had been in the area closed in and a car chase ensued. Kow fired at the pursuing agents from the fleeing Nissan. The agents rammed the Nissan and opened fire on the occupants of the disabled car. Kow and Chen were killed and Wang was seriously wounded. Shortly after the shootout, Chia was arrested nearby in his Mitsubishi. Three sets of handcuffs, three ski masks, and .45 caliber ammunition were found in Chia's car. The owner of the gun shop testified that several weeks before the shootout Chia had entered his shop with a companion and that the companion had purchased .45 caliber ammunition.

II.

Having survived the car chase and shootout, Wang made four separate statements to investigators.

The first statement was made to DEA agents before Wang was wheeled into surgery for treatment of nine gunshot wounds. The DEA agents took pains to insure that Wang understood that he was in danger of death before taking his statement. The agents believed that Wang's statements would be admissible as a dying declaration in case he did not survive the surgery. Wang told the agents that he, Chen, and Kow had planned to rob the drug dealers, that he did not know that they were really DEA agents, and that he did not know of anyone other than himself, Kow, and Chen involved in the actual shooting. Wang admitted to shooting one of the agents three times with a revolver and admitted providing a .45 caliber pistol for the robbery.

Wang made his second statement to a Pasadena police officer later that afternoon, following successful surgery. Wang admitted that he had planned to rob the "drug dealers" in conjunction with Kow and Chen. Wang admitted that he shot two of the agents. He provided details about the staging of the robbery, with the red Nissan following behind the Volvo.

Wang's third statement was given to Pasadena police officers later that evening. The interview was tape recorded and the entire tape was admitted into evidence as a State prosecution exhibit and played for the jury at Wang's subsequent trial. During this interview, the police officer asked about Michael Chia's involvement. Wang had not previously mentioned Chia but had described the involvement of Chen and Kow in the plot. Wang said that Chia told h im not to go through with the plan. When pressed by the investigator, Wang said that Chia was not involved in the plot and was not going to get any drugs or

money. Wang said that Chia warned him that Chen and Kow might turn on him and rob him. The investigator, not Wang, returned repeatedly to the subject of Chia's involvement. Wang repeated that Chia was not involved in the plot, although he knew about it. Wang said that Chia had dropped him off at Kow's apartment and was present later to protect Wang because he feared Kow and Chen would turn on him.

Wang's fourth and final statement was given to the FBI two days after the shooting. Wang confessed that not only did he plan to rob the agents but that he knew in advance that Kow planned to kill the agents. Wang stated again that Chia told him not to go through with the plot. He also stated that when he spoke with Chia in the restaurant parking lot he had told Chia to go home, but Chia remained to look out for his safety. In response to questions, Wang said that the handcuffs found in Chia's car belonged to an individual named Johnny Lee and that he did not know anything about the ski masks.

Wang's description of his movements preceding the shootings was consistent with his prior statements to law enforcement officers and was consistent with the independent observations of DEA agents. Wang accurately described Chia taking him to Kow's apartment where Wang delivered a gun and ammunition and learned of the final plans for the robbery. He also accurately recounted that he went with Chia to a nightclub that evening, stayed the night with Chia at a friend's house, and was dropped off by Chia at Kow's apartment the next morning.

III.

[1] The district court's decision to deny a 28 U.S.C. § 2254 habeas petition is reviewed *de novo*. *Alvarado v. Hill*, 252 F.3d 1066, 1068 (9th Cir. 2001). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §

2254(d), a federal habeas court may grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court only if the state court adjudication resulted in a decision that (1) was contrary to clearly established Federal law as determined by the Supreme Court of the United States, or (2) involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

[2] Under AEDPA "we must reverse a state court's decision as involving an 'unreasonable application' of clearly established federal law when our independent review of the legal question does not merely allow us ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous—in other words that clear error occurred." *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000).

IV.

[3] It is clearly established federal law, as determined by the Supreme Court of the United States, that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense the exclusion of that statement may rise to the level of a constitutional due process violation. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Under AEDPA, Ninth Circuit case law may be persuasive authority for deciding whether a state court decision unreasonably applied Supreme Court precedent, or it may help us determine what law is clearly established. *Lindsey*, 212 F.3d at 1154. In a habeas proceeding, we have traditionally applied

a balancing test to determine whether the exclusion of evidence in the trial court violated petitioner's due process rights, weighing the importance of the evidence against the state's interest in exclusion. *Miller v. Stagner*, 757 F.2d 988, 994 (9th Cir. 1985), *amended on other grounds*, 768 F.2d 1090 (9th Cir. 1985). The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable evidence. *Miller*, 757 F.2d at 995.

[4] When deciding whether an evidentiary rule violates the Due Process Clause or the Sixth Amendment, we apply a five-part balancing test. *United States v. Duran*, 41 F.3d 540, 545 (9th Cir. 1994); *Whelchel v. Washington*, 232 F.3d 1197, 1211 (9th Cir. 2000). The factors considered are (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990).

V.

Applying the *Tinsley* test to Wang's statements, we conclude that the factors tip overwhelmingly in Chia's favor. We may not reverse a state court decision simply because it is inconsistent with a rule established by a Ninth Circuit case. *Lindsey*, 895 F.2d at 1154. However, application of the *Tinsley* factors persuades us that Wang's statements were clearly both reliable and crucial to Chia's defense. Under *Chambers*, exclusion of these statements was an unreasonable application of clearly established federal law that violated Chia's constitutional due process rights.

Wang's Third Statement.

[5] On the paramount issue of reliability (the second factor of the balancing test), the self-inculpatory nature of Wang's statements weighs in favor of admission. The very words in this statement that exculpate Chia are highly inculpatory of Wang. Wang said that after he informed Chia of the plot, Chia tried to talk him out of it. This admission inculpates Wang by removing all doubt as to mens rea. Wang discussed the plot with his friend, was warned not to go through with it, and after plenty of time for reflection decided to go ahead anyway. At the same time, Chia's warning establishes that he was not furthering the conspiracy but, quite the opposite, was discouraging his friend from participating. The inculpatory force of this statement with respect to Wang is obvious, and indeed the government conceded at oral argument that the very words, "he told me don't do it," at once inculpate Wang and exculpate Chia.

[6] Self-inculpatory statements have long been recognized as bearing strong indicia of reliability. *See, e.g.*, Fed. Rule Evid. 804(b)(3); *Williamson v. United States*, 512 U.S. 594, 599 (1994) ("[R] easonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."). Wang's third statement therefore bears strong indicia of reliability.

[7] The first and fifth factors of the balancing test, the probative value of the excluded evidence on the central issue and whether it constitutes a major part of the attempted defense, also weigh in Chia's favor. Chia's whereabouts, movements, and actions before and during the commission of the crime are not disputed. The issue is whether his behavior was aimed at facilitating and encouraging the crime as the State contends, or at discouraging the crime and protecting his friend from harm. This question underlies Chia's entire defense, and Wang's statements are extremely probative on this point.

[8] The third factor of the balancing test, whether the evidence is capable of evaluation by the trier of fact, is also satisfied. The jury heard evidence from the State's expert that Chia's observed behavior was consistent with "counter surveillance." In other words, the State's expert theorized that Chia's actions were consistent with criminal behavior aimed at discovering and thwarting police efforts to detect the conspiracy. If Wang's statements were introduced, the jury would be called upon to weigh the plausibility of the State's theory against Wang's testimony, which explained the events in a way that would not subject Chia to criminal liability. Such determinations are well within the province of the fact finder.

[9] The fourth factor, whether the evidence is the sole evidence on the issue or merely cumulative, is also satisfied. Wang exercised his Fifth Amendment rights and refused to testify at Chia's trial. Chia, as was his right, also declined to take the stand. Chia attempted, on cross examination of the State's witnesses, to establish his explanation of events. However, he was not able to elicit testimony from those interested in convicting him that would establish his role in discouraging the conspiracy. Chia was left with Wang's statements as the only means of establishing his role.

[10] Chia's third statement squarely satisfies all of the factors in the balancing test, and clearly should have been admitted.

Wang's Other Statements.

Wang's fourth statement adds the information that after Chia arrived at the restaurant parking lot, he told Wang not to go through with the crime. Wang, in turn, told Chia to go home. Chia remained, Wang said, to watch out for Wang's safety, not to further the robbery. In the fourth statement, Wang also admits for the first time that he knew in advance that Kow

planned to kill the "drug dealers" as well as rob them. In this statement, Wang admits to being warned not to go through with the crime at a time when he knew that murder was part of the plot. Wang admits an opportunity to back out, presumably with Chia driving him to safety in the black Mitsubishi, moments before the crime commenced. With each retelling of events Wang recalls more detail (as he recovers from surgery) and the statements become more self-inculpatory. As his statements progressively exonerate Chia, they also destroy any hope Wang might have for a defense or sentence mitigation based on lack of knowledge or intent.

Wang's first and second statements do not directly exculpate Chia, although they do of course inculpate Wang. In these statements, Wang does not include Chia as he freely describes the planning and execution of the crime. This tends to show Chia was not involved. While the first statement does not technically meet the definition of a dying declaration, it was given when Wang knew that he was in real danger of imminent death, a traditional indicium of reliability.

The four statements that Wang gave to investigators form a picture of the crime from Wang's point of view and the credibility of each assertion is enhanced by its context in Wang's consistent depiction. All four statements are consistent with each other and consistent with the DEA's observation of events. When the defendant is attempting to introduce an out-of-court statement, the corroboration of the contents of that statement with other evidence is a factor pointing toward reliability and admission. *Chambers*, 410 U.S. at 300. Likewise, numerous consistent confessions corroborate each other. *Id.*

[11] Taken as a whole, the four statements bear strong indicia of reliability and are crucial to Chia's defense. The State's interest in enforcing its hearsay rules "is based on

experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact." *Chambers*, 410 U.S. at 298. The evidence here bears strong indicators of trustworthiness. The inculpatory nature of Wang's statements and the fact that his first statement was made while he was in imminent danger of death mark the statements with the same indicators of reliability that underlie traditional exceptions to the hearsay rule. On the particular facts of this case the State's interest in excluding the evidence is minimal while the importance of the evidence is great. On the record before us, we are firmly convinced that a mistake was committed and that Wang's statements should have been admitted into evidence.

VI.

[12] A writ of habeas corpus is properly granted for a state court decision involving an unreasonable application of clearly established Federal law. 28 U.S.C. § 2254(d)(1). This standard includes a state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case. *Williams*, 529 U.S. at 407-8.

In the present case, the trial court identified *Chambers* as the governing legal rule. *Chambers* held that when a hearsay statement bears persuasive assurances of trustworthiness and is critical to the defense it may not be excluded by a mechanistic application of state hearsay rules. *Chambers*, 410 U.S. at 302.

[13] As to the importance of Wang's statements to the defense, the trial court accurately summarized what was at stake for Chia:

> The activity of Mr. Chia, if taken by itself, is subject to two reasonable interpretations: one, that he was simply trying to help out the buddy and the other, of

> course, knowing full well what his buddy was doing, he was there to assist and to facilitate and to encourage and aid and abet and everything else.

Despite this clear statement of Chia's position, the trial judge made the decision that Wang's statements did not clearly help the defense. We find this conclusion to be unreasonable. Wang stated that Chia told him not do it and that Chia was not involved in furthering or encouraging the crime. These statements are clearly helpful to Chia. If believed by the jury, they exonerate Chia. While they also show that Chia knew of the plot in advance, mere knowledge is not sufficient to sustain a conviction under an accomplice theory.

As to the reliability of the statements, the court pronounced that the statements did not "match the [Cal. Evid. Code] 1230 definition" of reliability.[1/] The judge acknowledged that Wang's statements could be admitted against Wang at his own trial as statements against penal interest. The judge also evinced understanding that the statements could be admitted against Wang because people tend not to make self-inculpatory statements unless they believe them to be true. But, the court noted, at that point Wang would be a party and a different rule

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1. Cal. Evid. Code § 1230 reads as follows: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

would apply. The judge also observed, using his own hypothetical examples, that while a statement may be "a classic declaration against penal [interests]" it could still lack the reliability " that this particular section requires." The judge further commented that he did not believe statements made "while you are in the clutches of the law" fall under § 1230.

Our analysis shows that Wang's statements bear compelling indicia of reliability. The trial court engaged in a classic example of what *Chambers* prohibits: "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers*, 410 U.S. at 302.

The judge's distrust of post-arrest statements is also misplaced. The United States Supreme Court succinctly explained circumstances in which post-arrest statements are suspect: "Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Williamson*, 512 U.S. at 601. This rationale applies where the codefendant is *inculpating* the defendant in order to *exonerate* himself. Here Wang did just the opposite, exonerating Chia while inculpating himself.

The California Court of Appeal made the same error as the trial court when it pronounced Wang's post-arrest statements unreliable, citing *People v. Campa*, 686 P.2d 634, 640 (Cal. 1984). However, *Campa* identifies post-arrest statements as inherently suspect "where a declarant in police custody seeks to exculpate himself by implicating another suspect." *Id.* Federal habeas corpus relief does not lie for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). We comment on *Campa* only to point out again that the reasoning behind suspicion of post-arrest statements obviously does not apply to the facts of

this case.

The present case is also distinguishable from *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998). In *LaGrand*, Karl LaGrand's confession included two separate statements: first, Karl admitted that he stabbed the victim, and second, he said that Walter LaGrand did not stab anyone. We held that the exclusion of Karl's confession in Walter's trial did not violate Walter's due process rights because "a statement that includes both incriminating declarations and corollary declarations that, taken alone, are not inculpatory of the declarant, must be separated and only that portion that is actually incriminating of the declarant admitted under the exception." *LaGrand*, 133 F.3d at 1267-68 (citing *Williamson*, 512 U.S. at 599-600). Here, the key portions of Wang's statements that exculpate Chia are not corollary; they are directly inculpatory of Wang.

[14] The trial court's conclusion that Wang's statements were inadmissible under *Chambers* was clear error and an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States.

VII.

[15] For the foregoing reasons we conclude that Wang's four statements were both reliable and crucial to Chia's defense. Because the trial court's exclusion of these statements was an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States, the decision of the district court is REVERSED and the matter is REMANDED with instructions to GRANT the writ of habeas corpus unless the State grants Michael Chia a new trial within a reasonable time.

BRUNETTI, Circuit Judge, dissenting:

I dissent because Wang's statements do not bear sufficient indicia of reliability, and the California trial court's exclusion of these statements as inadmissible hearsay did not deny Chia his due process rights under *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Having asserted his Fifth Amendment right against self-incrimination, Wang was unavailable to serve as a witness in Chia's trial. Thus, Chia sought to introduce hearsay statements made by Wang to the police, that were exculpatory in nature, as declarations against penal interest.[1/] *See* Cal. Evid. Code § 1230 (West 1999). The trial court determined that Wang's statements did not fall within this hearsay exception, and that the exclusion of the statements did not deprive Chia of his due process rights under *Chambers*. In order to determine whether exclusion of the hearsay statements rendered Chia's trial fundamentally unfair under Sixth and Fourteenth Amendments, we must examine the statements themselves.

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1. Section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

Co-conspirator Wang was first interviewed by the police on February 5, 1988 in the hospital emergency room prior to his undergoing surgery. Before receiving Wang's statements, the police informed Wang that he was badly injured and could possibly die in surgery for his several gunshot wounds. Wang stated that on February 1, 1988 he had entered into an agreement with Kow and Chen to steal $60,000 from some drug dealers. Wang admitted to shooting one of the agents and said that he did not know of anyone else involved in the actual shooting other than himself, Kow, and Chen.

A second statement was taken from Wang at 3:30 p.m. on February 5, 1988, after Wang survived the surgery. Wang told of a plan to "rip off" drug dealers. He recounted in greater detail the shooting of the men in the Volvo (e.g., Kow shot Agent Montoya and grabbed the money bag and Wang shot Agents Seema and Martinez) and details of the attempt by Kow, Chen, and himself to escape in the Nissan, and their eventual capture. No mention of Chia was made at this time.

Due to a malfunction in the tape recorder during the second interview, a third interview was conducted on the evening of February 5, 1988. Wang provided a confession that was substantially similar to that obtained in the second interview. During the third interview, however, Wang was also asked about the black Mitsubishi seen by the police. Wang explained that the Mitsubishi belonged to his friend Michael Chia. Wang said that he told Chia about the plan, and that Chia warned him against involvement and of the possibility that Chen and Kow could turn on him and rip him off.

The fourth and most detailed statement made by Wang came on February 7, 1988, when Wang was interviewed by an FBI agent. Wang stated that Kow asked him a week before the incident to help him with a "rip off" and the plan included the murder of the individuals to be robbed. Wang again said that he

told his friend Chia about the plan and that Chia warned him against involvement for fear of being turned against by Kow and Chen. Chia nevertheless drove Wang in Chia's Mitsubishi to Kow's apartment on the night of February 4 so that Wang could deliver a gun and ammunition and to learn of the final plans. Chia and Wang later went to dinner at the 8000 Club and stayed the night at a friend's house. The next morning, Chia dropped Wang off at Kow's apartment. Chen drove Kow and Wang to Tiny Naylor's. While acting as a lookout in the restaurant parking lot, Wang saw Chia in the Mitsubishi driving around the lot. Wang explained that Chia was watching out for him and again told Wang not to do it. Wang told Chia to go home, but Chia stayed to watch out for Wang. Wang then recounted details of the "rip off," escape, and capture.

The California Court of Appeal affirmed the trial court's determination that the four statements did not fall within the statement against the penal interest provision of Cal. Evid. Code § 1230. Under California law, "a declaration against penal interest [is] admissible under Evidence Code section 1230 only as to those statements which are specifically disserving to the interests of the declarant. No collateral assertions can be permitted." *People v. Garcia*, 115 Cal. App. 3d 85, 105 (Cal. Ct. App. 1981). The court found that because Chia was not interested in the admission of the portions of Wang's statements which specifically disserved Wang's interests (such as Wang's statements regarding his own involvement in the "rip off" and shooting of the DEA agents), but instead only sought to use Wang's collateral assertions that Chia was not involved in the actual shooting and that Chia tried to dissuade Wang from participating in the enterprise at all, Wang's statements were properly excluded. The California Supreme Court affirmed without comment.

The exclusion of Wang's statements was not an unreasonable application of "clearly established law" as

articulated by the Supreme Court in *Chambers*. It is true that hearsay rules "may not be applied mechanistically to defeat the ends of justice," *Chambers v. Mississippi*, 410 U.S. at 302, however, the state trial court's exclusion of Wang's statements reached neither the opposite conclusion from the Supreme Court on a question of law nor a different result on materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 401-02 (2000).

There are fundamental differences between Wang's hearsay statements and the statements excluded in *Chambers*, and the majority has not explained why this case should not be distinguished. In *Chambers*, the Supreme Court overturned a decision to exclude a third-party confession as hearsay because that person confessed on separate occasions to three different friends, "under circumstances that provided considerable assurance of their reliability." *Chambers*, 410 U.S. at 300. Chambers was convicted of killing a policeman in a small town in Mississippi. Gable MacDonald had confessed to the killing of the officer in a statement to Chambers' lawyer, but he later repudiated the confession. At trial, Chambers sought to show that he did not shoot the officer. He also attempted to show that McDonald was the shooter. The state trial court would not permit Chambers to introduce the testimony of three witnesses, to whom McDonald had admitted shooting the officer, on the grounds that the proffered testimony was hearsay. Under its "antiquated" rules of evidence, Mississippi recognized statements against pecuniary interest, but not statements against penal interest, as an exception to the hearsay rule. *Id.* at 302. Observing that Chambers's defense was "far less persuasive" than it might have been had he been allowed to admit testimony from other sources about McDonald's confessions, *id.* at 294, the Court held that exclusion of this testimony, crucial to Chambers's defense, denied him a fair trial guaranteed by due process. *Id.* at 300.

Critical to the outcome in *Chambers* was the Court's determination that despite Mississippi's state evidentiary rules, the hearsay statements involved "were originally made and subsequently offered at trial under circumstances that provided *considerable assurance* of their reliability." *Id.* (emphasis added). Of particular importance, each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred, each statement was corroborated by some other evidence in the case (e.g., McDonald's sworn, but later repudiated, confession, the testimony of an eye witness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of McDonald's prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon, as well as "the sheer number of independent confessions"), as well as the fact that the confession was in a very real sense self-incriminatory and unquestionably against interest. *Id.* at 300-01.

None of these considerations favors Chia. Wang's four statements were all made to the police during post-arrest interrogation, and only in response to specific questions regarding the black Mitsubishi and Chia's involvement, whereas the declarant in *Chambers* made three independent statements to three different friends. As the state trial court noted, Wang was quite literally caught in the act, and it is not uncommon for someone in Wang's situation to make statements to protect an arguably less culpable confederate, especially when that confederate is a good friend. Thus, Wang's statements can hardly be described as "spontaneous."

Furthermore, unlike in *Chambers*, there is no evidence to corroborate Wang's statements regarding Chia's purported uninvolvement, nor could Wang be impeached about these statements since he invoked his Fifth Amendment rights. Indeed, although corroborating evidence is lacking, the record

does reveal Chia's own admissible statements to the police whereby he acknowledges an agreement with Wang to act as Wang's bodyguard, as well as a plan for Chia to hide somewhere near Tiny Naylor's restaurant to look out for and come to Wang's aid should Wang give the signal by sticking his arm out of the car.

Lastly, while portions of Wang's statements were undoubtedly self-inculpatory, those sections exculpatory to Chia were not against Wang's interest and therefore were not as reliable as the inculpatory parts. In *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998), we held that the state trial court's exclusion of hearsay statements of a co-defendant as falling outside of Arizona's "statement against penal interest" rule, which is identical to Federal Rule of Evidence 804(b)(3), did not violate the defendant's due process rights. There, defendant Karl LaGrand twice confessed to the police to stabbing the victim. *Id.* at 1268. During both confessions, Karl LaGrand stated that he, himself, stabbed the victim, and that his co-defendant, Walter LGrand, did not stab anyone. Based on Supreme Court precedent, we determined that "[t]he reliability that attends the inculpatory part of the declarant's confession does not afford any reliability to that part of the statement that merely exculpates [the defendant]." *Id.* at 1268. We further explained that

> [b]ecause the 'statements against penal interest' exception to the hearsay rule is premised upon the inherent reliability of statements that tend to incriminate the declarant, federal courts have concluded that a statement that includes both incriminating declarations and corollary declarations that, taken alone, are not inculpatory of the declarant, must be separated and only that portion that is actually incriminating of the declarant admitted under the exception.

Id. at 1267-68 (citing *Williamson v. United States*, 512 U.S. 594, 599-600 (1994) (noting that judges in federal courts must separate the incriminatory portions of statements from other portions for purposes of Rule 804(b)(3) because "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts")); *Carson v. Peters*, 42 F.3d 384, 386 (7th Cir. 1994) ("Portions of inculpatory statements that pose no risk to the declarants are not particularly reliable; they are just garden variety hearsay."); *United States v. Porter*, 881 F.2d 878, 882-883 (10th Cir. 1989) (if a statement exculpatory to the accused is severable from the statement inculpatory to the declarant, each statement must be separately analyzed under Rule 804(b)(3)); *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir. 1978) ("To the extent that a statement is not against the declarant's interest, the guaranty of trustworthiness does not exist and that portion of the statement should be excluded.").

Since we are deciding whether the exclusion of Wang's statements violated Chia's *federal* due process rights, our decision in *LaGrand v. Stewart*, and the cases to which it cites, are particularly helpful on the question of reliability. They imply that excluding the exculpatory portions of a confession do not raise due process concerns because those portions are inherently unreliable. Both the state trial court and California Court of Appeal recognized as much, noting that Chia was only interested in introducing the exculpatory portions of Wang's statements. Indeed, this is not a case where the exculpatory and inculpatory portions are intertwined in a seamless and unseverable confession. A review of the statements reveals that each was made in the course of question-and-answer style police interrogation where the direction of the questions continually and abruptly shifted from one topic to the next. For example, in Wang's third statement, he admitted that he shot a DEA agent and that he and Kow had planned the transaction to be a "rip-off" from the very beginning, all before even

mentioning Chia's name. It is both simple and necessary to identify and separate the reliable inculpatory portions of the statement from those that merely exonerate Chia and do not have the same indicia of reliability. Furthermore, even if Chia also sought to admit the self-inculpatory portions, those parts would have been of questionable benefit to Chia. Unlike *Chambers*, where only one person could have shot the police officer, our case deals with accomplice and conspiracy behavior. Wang's confession in no way exonerates anyone else.

Although only persuasive, consideration of the factors set forth in *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990) does not support Chia's due process claim. Wang's statements are, at best, minimally reliable, and hence their exclusion did not render the trial fundamentally unfair. Chia has pointed to nothing in the record that requires this court to disregard the state court's findings, nor has he demonstrated that Wang's statements were otherwise reliable. *Id.* Because Wang's statements demonstrate that Chia knew of the plan to rob and murder beforehand, the slight value of Wang's testimony to Chia's defense did not outweigh the state's interest in excluding the evidence. Therefore, Chia has not shown that his interest in the admission of Wang's post-arrest hearsay statements outweighs the state's interest in its exclusion under the hearsay rule, nor were Chia's due process rights violated. *See Galindo v. Ylst*, 971 F.2d 1427, 1429 (9th Cir. 1992).

Again, this court's role is to decide whether the state trial court's exclusion of Wang's hearsay statements was an *unreasonable application* of clearly established federal law as interpreted by the United States Supreme Court. *Williams* makes clear that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *See Williams*, 529 U.S. at 410. The trial court held an evidentiary hearing and heard arguments on the admissibility of the hearsay statements, in which it determined that the statements fell

outside of § 1230 of the California Evidence Code for the same reason that exclusion of the statements does not implicate due process concerns under *Chambers*—the exculpatory statements lacked any indicia of reliability. I am not left with a firm conviction that the trial court's decision was erroneous.

I would affirm the district court's decision dismissing Chia's petition for habeas corpus.

APPENDIX E

FILED
APR 23 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SU CHIA, Petitioner-Appellant, v. STEVEN CAMBRA, Jr., Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 99-56361 D.C. No. CV-97-05199-KMW ORDER

Before: D.W. NELSON, BRUNETTI and KOZINSKI, Circuit Judges

Judge Brunetti voted to grant the petition for rehearing and recommended granting the petition for rehearing en banc.

Judge Kozinski and Judge Nelson voted to deny the petition for rehearing. Judge Kozinski voted to deny the petition for rehearing en banc. Judge Nelson recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for

rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P.35

The petition for panel rehearing and the petition for rehearing en banc are DENIED.